UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LEISER CONSTRUCTION, LLC

AND **Case 17-CA-23177**

IRON WORKERS LOCAL UNION NO. 10,
A/W INTERNATIONAL ASSOCIATION OF
BRIDGE, STRUCTUAL, ORNAMENTAL &
REINFORCING IRON WORKERS, AFL-CIO

ORDER

The Charging Party's Request for Review of the General Counsel's decision affirming the Regional Director's compliance determination is denied. The Charging Party argues, inter alia, that (1) *Oil Capitol Sheet Metal, Inc.*[1] was wrongly decided; (2) retroactive application of *Oil Capitol* will result in manifest injustice; (3) *Oil Capitol* should not be applied to this proceeding because the discriminatees were not "salts"; and (4) the Region did not properly apply *Oil Capitol* principles.

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[1] 349 NLRB 1348 (2007), pet. for review dismissed 561 F.3d 497 (D.C. Cir. 2009). In *Oil Capitol*, the Board held that "the traditional presumption that [a discriminatee's] backpay period should run from the date of discrimination until the respondent extends a valid offer of reinstatement" no longer applies where the discriminate is a union salt. 349 NLRB at 1349. The Board accordingly held that it would "now require the General Counsel as part of his existing burden of proving a reasonable gross backpay amount due to present affirmative evidence that the salt/discriminatee, if hired, would have worked for the employer for the backpay period claimed in the General Counsel's compliance specification." Id. The Board also held that an instatement order for a salt/discriminatee would be subject to defeasance if, at the compliance stage, the General Counsel "fails to prove by affirmative evidence the reasonableness of a claim that the backpay period should run indefinitely … ." Id.

We decline to address at this time the Charging Party's argument that *Oil Capitol* was wrongly decided.[2] Further, we find that the Charging Party has failed to show that retroactive application of *Oil Capitol* will result in "manifest injustice" and that the discriminatees were not "salts."[3] Accordingly, we find that the Regional Director correctly applied *Oil Capitol* to this proceeding.[4]

We additionally find that the Regional Director properly applied *Oil Capitol* principles in limiting the backpay period for discriminatees Michael Bright and Richard Christopherson to 2 weeks . The Region's investigation showed that their prior employment as salts had been short-term. Indeed, none of the discriminatees' 11 prior instances of employment as salts lasted longer than 1 month. Moreover, without other evidence to refute the historical data demonstrating the consistently short duration of the discriminatees' employment under similar circumstances, the Region could not affirmatively prove that the discriminatees would have continued employment with the Employer beyond a short period of time. We therefore find, with respect to Bright and Christopherson, that, absent other relevant evidence, utilizing the average duration of their employment in prior salting efforts was an appropriate methodology for determining

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[2] For this reason, we also deny the Charging Party's Motion for Briefing and/or Consolidation, requesting the Board to consolidate this case with other cases which also seek to have the Board overturn its decision in *Oil Capitol*.

[3] Under Board law, salts are "individuals, paid or unpaid, who apply for work with a nonunion employer in furtherance of a salting campaign." *Oil Capitol*, 349 NLRB at 1348 fn. 5. A salting campaign, in turn, is defined as a campaign in which a union sends its member(s) to an unorganized job site "to obtain employment and then organize the employees." *Tualatin Electric*, 312 NLRB 129, 130 fn. 3 (1993), enfd. 84 F.3d 1202 (9th Cir. 1996).

[4] Chairman Liebman, who dissented in *Oil Capitol*, concurs in the denial of the Charging Party's Request for Review. While Chairman Liebman believes that claims of manifest injustice resulting from retroactive application of a new legal rule should be considered on a case-by-case basis, she agrees that the Charging Party has not shown manifest injustice here.

their backpay because it provided the best estimate of how long they would have remained on the job with the Employer.[5] We further find, with respect to discriminatee David Coleman, that an estimate was not required because the Region had actual evidence of how long he was employed by the Employer. We therefore agree that in these circumstances, the Regional Director did not err in applying *Oil Capitol*.

Accordingly, we conclude that the Charging Party has failed to establish a sufficient basis for reversing the Regional Director's compliance determination.

Dated, Washington, D.C., July 21, 2010.

WILMA B. LIEBMAN,	CHAIRMAN
CRAIG BECKER,	MEMBER
MARK GASTON PEARCE,	MEMBER

[5] In calculating the average duration of Bright's and Christopherson's prior employment, the Regional Director included two instances in which they were discharged, allegedly for discriminatory reasons. Were we to assume arguendo that these allegations are true, we would then logically find that the Regional Director improperly included these involuntary termination dates in calculating how long the employees would have chosen to remain at work for the Respondent. Nor should the unlawful actions of other employers serve to limit the liability of the Respondent for its unlawful acts. Nonetheless, we find that the Regional Director's inclusion of these two foreshortened periods of employment here was harmless error because it did not substantially affect his determination of the appropriate backpay periods for Bright and Christopherson.